



Copyright in the Digital Age

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Chapter __

Copyright in the Digital Age

Kyle K. Courtney

Introduction

Today's law librarian faces an excess of copyright-related questions dealing with every facet of library services: digital archives, virtual reference, interlibrary loan, access to law, e-reserves, licensing, etc. Many librarians do not have the formal instruction necessary to answer all of these questions, but many find themselves becoming *de facto* library copyright experts by reading, writing, collaborating, attending conferences, and working with informed colleagues. In this digital, on-demand environment in which law libraries exist, it is almost a requirement that librarians have a basic understanding of copyright to successfully assist students, faculty, and staff competently.

The goal of this chapter is to provide the fundamental instruction for some of the most popular topics facing law libraries in the digital age. Whether it is scanning chapters for e-reserves or accessing databases online, knowledge of copyright law can help mitigate risk, and enhance our patron's services. As librarians, we want to provide whatever our patron's desire. But, we also must balance the law versus the patrons needs. Fortunately, copyright law does not always restrict a patron's uses. In many cases a solid understanding of copyright can help ease a patron's fears, or provide legal alternatives to a patron's request, or help educate the community at large.

Copyright Law

Copyright is a form of intellectual property protection provided by the laws of the United States. The law protects original works of authorship including literary, dramatic, musical, and artistic works, such as novels, music, movies, art, architecture, and computer programs.

Origins and the U.S. Constitution

The current copyright law in the United States is the Copyright Act of 1976.¹ The current law can trace its intellectual beginnings to both American and European predecessors. However, copyright law in the United States had its most influential origins in the English legal system. After a nearly 100 year monopoly over the author's rights to print and retain profits for their own works, in 1709 the English parliament passed the Statute of Anne. It granted authors, for the first time, the right to print or reprint their works, combined with a statutory limited monopoly on those creations. For the first time in the history of law, authors had an economic incentive to create works, through the profits reaped by the limited monopoly, and also continue to contribute their work to the cultural when their works expired into the public domain.

Like many other ideas from England that found their way across the Atlantic during the founding the United States, the copyright ideas encapsulated in the Statute of Anne ended up in the U.S. Constitution. All of the copyright laws passed by Congress exist pursuant to Article 1, Section 8, Clause 8, of the Constitution, which gives Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”² This section of the Constitution is known as the “Copyright Clause.”

Pursuant to that authority, Congress passed, and George Washington signed into law, the first Copyright Act of 1790, based on the Statute of Anne. The 1790 Act provided protection only for a maps, charts, or books for a period of 14 years, renewable for an additional 14 years. After that, the work dropped into the public domain.

Congress consistently expanded the scope of copyright over the next 200 years and new works were added over time. Protection for print works was added in 1802; protections for musical compositions were added in 1831; protections for photographs were added in 1865; protection for paintings, drawings, and sculptures were added in 1870; protection for audiovisual works (movies) were added in 1909; protections for sound recordings were added in 1972, and architectural works were added in 1990. This chapter deals primarily with the Copyright Act of 1976, but in certain sections, we will note any legislative updates, amendments, or changes relevant to the discussion.

Copyright Act of 1976

The Copyright Act of 1976 (“Copyright Act”) made some significant changes to the previous U.S. copyright laws. Under the current law, copyright protection begins immediately at the creation of an original “work of authorship fixed in any tangible medium of expression.”³ Typically, a copyright lasts, under the current Copyright Act, for the life of an individual author or authors, plus 70 years. Alternatively, if a corporation is the author, the term is 95 years from creation or 120 years from publication, whichever is sooner.⁴

On March 1, 1989 the United States agreed to the Berne Convention of International Copyright. This eliminated the formalities of copyright registration. Authors no longer needed to put a copyright notice on their work. Additionally, it no longer required registration with the U.S. Copyright Office. However, although registration is optional, the Copyright Office offers advantages for registration. For example, registration is a prerequisite to filing a copyright infringement suit in federal court.

What is Copyrightable?

The Copyright Act lists the following types of works of authorship as those that can be protected by copyright:

- literary works
- musical works, including any accompanying words
- dramatic works, including any accompanying music
- pantomimes and choreographic works
- pictorial, graphic, and sculptural works
- motion pictures and other audiovisual works
- sound recordings
- architectural works⁵

Typically, these categories are viewed quite broadly. For example, since a computer program is written in computer code, it is considered a literary work.

Rights of a Copyright Holder

Let's say you do publish an original work of authorship, and register it with the U.S. Copyright office. What rights do you have as the owner of that work? Copyright owner have exclusive rights to:

- reproduced the work (make copies)
- prepare derivative works based upon the copyrighted work
- distribute the work
- publically perform the work
- publically display the work
- there are also other specific rights enumerated for particular kinds of works⁶

These are all considered the “bundle of rights” of the copyright owner. Any of these individual rights may be given away, licensed, sold, or any combination thereof. They are like pieces of property that can be allocated by the owner. For example, many musicians license their rights of reproduction and distribution to music distributors, so the distributor can legally can make, ship, and sell CD's, mp3's, and other copies of the music. Or, alternatively it is possible to transfer one right, while retaining all other rights.

If a person utilizes any of these rights without permission of the copyright owner, they may be liable for infringement. From this context, the Copyright Act is not only defining the rights of the owner, but also all the potential methods of infringement.

Infringement

To succeed on claim for direct infringement under Copyright Act, plaintiff must show: (1) ownership of valid copyright, and (2) unauthorized copying or violation of one of other exclusive rights afforded copyright owners pursuant to Copyright Act.⁷

Beyond direct infringement is the doctrine of secondary liability. This arises when one party is held legally responsible for the actions of another party. There are generally two kinds of copyright secondary liability: vicarious liability and contributory liability.

However, if the infringer is a library or archive, or the employee of a library or archive, then the court can lower or eliminate damages altogether if the infringer “believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under § 107.”⁸ To help support this in practice, a library should try and retain any documentation that determined that the alleged use was a fair use. We will learn more about fair use below.

Public Domain

Works that are not protected by copyright law belong to the public domain. There is no need to get permission to use a public domain work. It is interesting to note that the Copyright Act does not define the phrase “public domain.”

There are two kinds of works that belong to the public domain in the United States:

1. Works whose copyright protection has expired
 - The length of copyright protection varies depending on when a work was created and if, when, and where it was published.
2. Works that were never protected by U.S. copyright law

- This category includes:
 - Works created by an employee of the U.S. federal government in the course of her employment
 - Works that did not comply with the formalities by former U.S. copyright regimes
 - Works published in certain countries that have not joined international copyright treaties

Examples:

- *The Adventures of Tom Sawyer*, first published in the United States in 1876, is in the public domain because its copyright term has expired.
- Decisions of the U.S. Supreme Court are in the public domain because U.S. federal government employees create them during the course of their employment.⁹

These resources may help you determine if the work you wish to use is in the public domain:

- *The Copyright Slider* – Created by the American Libraries Association Office for Information Technology Policy (<http://librarycopyright.net/resources/digitalslider/>)
- *Copyright Term and the Public Domain in the United States* – Created by Peter Hirtle of the Cornell University Library (<http://copyright.cornell.edu/resources/publicdomain.cfm>)
- *U.S. Copyright Office Records* (<http://www.copyright.gov/records/>)
 - The Copyright Office has digitized its copyright registration records from January 1, 1978 to present. These records list publication and creation dates.

Exceptions to the Rights of Copyright Owners

Fair Use (§107)

One of the most famous, yet the least clear, of all the copyright limitations in the Copyright Act, is the doctrine of fair use.¹⁰ Under fair use, you may use copyrighted material without permission from the copyright owner. The doctrine itself was rooted in both English and U.S. caselaw, but was eventually codified in the Copyright Act.¹¹

The source of fair use law is statutory: Section 107 of the Copyright Act provides that fair use of a work “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”¹² is not copyright infringement. This list is not exhaustive; other uses of copyrighted work without permission may also be fair.

Section 107 of the Copyright Act provides:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.¹³

When the fair use provision was being proposed, Congress took the position that "since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts."¹⁴ Therefore, when courts are examining a fair use claim, they analyze each factor using the specific facts of the case to make a fair use determination. This examination of the four factors determines whether the use is "fair" or constitutes "copyright infringement." Courts weigh each factor, and make a decision based on the overview of all four factors.

Frequently, this four factor test is also used for risk mitigation. For example, law libraries frequently use this test to determine whether or not they can perform a certain activity or function involving copying or scanning. By reviewing the four factors, as a court might, a law librarian can determine whether or not the action she is taking might risk infringement or fall squarely within the realm of fair use. Because the four factors can act as a guideline for liability, the following section will examine each factor closely, and also through the lens one of the most recent digital fair use cases, *Authors Guild v. HathiTrust et al.*

Authors Guild v. HathiTrust et al.

The HathiTrust partnership is in the process of creating a shared digital repository which, to date, has almost 10 million scanned digital volumes from various university libraries around the United States. The process starts when Google creates digital copies of works in the universities' libraries in exchange for which Google provides digital copies to the universities. The universities then contribute these digital copies to the HathiTrust Digital Library.¹⁵ In 2011, the Authors Guild, the Australian Society of Authors, the Union Des Écrivaines et des Écrivains Québécois, and eight individual authors filed a lawsuit against HathiTrust, five major universities, and many university officials for copyright infringement. Specifically, the Authors Guild and others alleged that HathiTrust's storage of its repository of millions of full-text digital book scans was copyright infringement. In 2012, U.S. District Court Judge Harold Baer summarily dismissed the Authors Guild's lawsuit against the HathiTrust library collaborative. Judge Baer employed the fair use test, and found that the repository was not only providing new avenues for scholarship, but also enhancing access for the print and visual disabled. He stated, dismissing the motion, "I cannot imagine a definition of fair use that would not encompass the transformative uses made by the defendants and would require that I terminate this invaluable contribution to the progress of science and the cultivation of the arts that at the same time effectuates the ideals of the ADA."¹⁶ Let's examine each factor and how they were utilized to analysis a massive digitization project.

Fair Use Factor One: Purpose and Character of the Use

The first factor plays a major role in the fair use analysis. This factor distinguishes "non-profit educational" uses with "commercial" ones. Obviously, "non-profit educational" uses are

considered more of a fair use; while commercial uses may be a sign of infringement. Law libraries that are part of a for-profit firm, private law libraries, and membership-based law libraries would not always receive a favorable evaluation on the first factor because of their inherent “commercial” nature. Questions that arise during this inquiry ask: Are you making profit using the copyrighted work in some commercial way, such as selling copies, charging clients, or are you using it for teaching purposes? Typically a court will also enquire about making a transformative use of the work.

Transformative use is the use of copyrighted material in a manner, or for a purpose, that differs from the original use.¹⁷ This use develops in such a way that the expression or meaning is essentially new. For example, when copyrighted concert posters from a Grateful Dead archive were reproduced without permission in a Grateful Dead biography, the use of the posters was found to be transformative, because they were a new and different use than the poster’s original intent – namely, concert promotion.¹⁸

In *Authors Guild v. HathiTrust et al.*, the court closely examined the first factor. Here, the character of the use was clearly a non-profit, educational use. The university libraries had entered into agreements to convert the books in their libraries into a digital format, and then deposit them into the collective HathiTrust Digital Library. When a user searches a term in the Digital Library, it reveals only the pages on which the term is found and the number of times the term is found on each page. Accordingly, no actual text from the book is ever shown, except to those students who are visually impaired. This clearly falls within the context of non-profit, educational use.

Judge Baer also examined the transformative use. Again, a transformative use occurs when a change in the content has been made into something new or different. Here, Judge Baer

stated that the use was transformative because it serves a different purpose than the original work: namely, providing a searchable database of millions of books, and making full text only available to the visually impaired.

Fair Use Factor Two: *Nature of Copyrighted Work*

Courts often begin the second factor work by examining whether the work is informational or fact-based versus creative or fictional. The court also may examine whether copyrighted work is published or unpublished. The law is more protective of unpublished works because authors have the right to decide whether and when they will make their work public. Using a previously published work that has fallen out of print may tilt toward fair use since the work is not otherwise available. The law is also more protective of highly creative and imaginative works, so using an excerpt from a novel about a beloved boy wizard may lean further away from fair use than a snippet from a heavily fact-based nonfiction book. Copyright protects expression, not ideas or facts, and copyright on factual works is considered to be “thinner” than copyright on highly creative works. It is also possible that a court may take into consideration whether a digital work should be treated differently from one in print, because of the technological ease in which it can be copied.

In *Authors Guild v. HathiTrust*, the court went directly to the informational/creative examination, since the major of the works inside HathiTrust were already published. Judge Baer acknowledged that there is more room for fair use claims of more factual materials, but he did not find it relevant to this case. He held that in transformative uses, like HathiTrust, the

second factor was "not dispositive."¹⁹ In other words, it did not help bring about any settlement on the fair use issue.

Fair Use Factor Three: *Amount and Substantiality Used*

This factor is not about quantity. In many previous fair use cases, both quantity and quality are taken into account. For example, in *Harper & Row v. Nation Enterprises*, a magazine, without permission, published roughly 300 words taken from former President Gerald Ford's book-length memoir. Despite the small percentage of the overall work that the magazine used, the Supreme Court held that the third factor weighed especially against fair use because the excerpts were all about Ford's pardon of Richard Nixon and these pieces made up the "heart" of the book.²⁰

Therefore a court may look to determine whether there is a small piece of a copyrighted work being used, like a paragraph from a 300-page book or a minute-long clip from a feature film, or is there a use of the entire work. However, it can be fair to use an entire work; the important thing to remember is that the law favors using just the amount you need for your purpose. Always remember the *Harper & Row* holding, however. It still can be a violation to use even a small portion of a copyrighted work if what you're taking is the "heart of the work." Generally there are no bright lines when it comes to what percentage of the copyrighted work is too much to use, but the higher the percentage, the more likely this factor is to count against fair use.

In *Authors Guild v. HathiTrust*, HathiTrust indisputably had made copies of entire books, and was showing copies of entire books to users with print disabilities. Judge Baer simply stated that the law favors using just the amount you need for your purpose. He concluded that for

HathiTrust to facilitate word searches and provide access for print-disabled individuals “it [was] necessary to copy entire works.”²¹ The digitally scanned copies of entire books were necessary, and therefore, a legitimate fair use to fulfill the purpose of the HathiTrust.

Fair Use Factor Four: *Market Effect*

The purpose of copyright is to encourage creation. Using something in a way that means lost sales to the copyright owner will weigh against fair use. The reasoning is logical: If authors or filmmakers thought that they would never be able to receive value for their work, they might be less likely to share that work with the public, which would be a loss for everyone. In considering market effect, the law tries to protect creators. Courts, then, often enquire as to whether the use of this copyrighted work take away a sale of the work. They ascertain whether a particular use will cut into the potential market or value of the work.

In *Authors Guild v. HathiTrust* there wasn’t much of an argument about the current market, as there was for a potential market. The Authors Guild claimed that HathiTrust was precluding opportunities for the development of future licensing opportunities. In a well reasoned analysis, Judge Baer stated that where a use is transformative, copyright holders cannot undermine fair use just by claiming that they intend to license that use in the future. “A copyright holder cannot preempt a transformative market.”²² Plaintiffs actually had to prove, and failed to prove, that there was some market harm, or a meaningful likelihood of future harm exists. Without evidence of any actual harm, the court found the assertions of potential future licensing revenue to be mere “conjecture.”²³

Conclusion

Judge Baer relied heavily on the transformative nature of creating a digital repository of books. Transformativeness seemed to drive the analysis, and received a great deal of attention in every fair use factor. Judge Baer found that the repository was not only providing new avenues for scholarship, but also enhancing access for the print and visual disabled. He concluded that this was definitely a transformative use and stated, “I cannot imagine a definition of fair use that would not encompass the transformative uses made by the defendants and would require that I terminate this invaluable contribution to the progress of science and the cultivation of the arts that at the same time effectuates the ideals of the ADA.”²⁴

For Private Law Libraries

What does this decision mean for private law libraries that are not involved in non-profit, educational uses? Commercial versus non-commercial work does not have as much of a bearing on fair use analysis as one would think. In a seminal article published in 2008 titled “An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005,” data suggested that a finding that the defendant’s use was for a commercial (rather than noncommercial) purpose “had no significant influence on the outcome of the [fair use] test.”²⁵ This was after examining 306 reported opinions from 215 cases that made substantial use of the fair use test. That means that private libraries *could* consider making digital transformative uses of materials, provided that they continued to fall within the realm of fair use for the other factors. Commercial uses were far from dispositive in deciding for fair use.

Library Exceptions (§108)

Section 108 of the Copyright Act provides under certain conditions it is not infringement for a library or archives, or its employees acting within the scope of their employment, to reproduce or distribute one copy of a work (or in particular cases, three copies). There are very specific conditions in Section 108(a) that must be met to qualify for this exception:

- Libraries copies cannot be made for any direct or in-direct commercial advantage.
 - There is conflicting analysis about whether libraries associated with for-profit organizations (law firm libraries, corporate libraries, etc.) may rely on this law. A House of Representatives report, in the legislative history of the Copyright Act, indicates that a for-profit library can make copies as long as the copying itself is not the overall goal of the institution where the copying takes place. A Senate report, found in the same legislative history, has a different interpretation.²⁶
- The collections of the library must be open to the public, available to researchers affiliated with the library, or other persons doing research in a specialized field.
 - Again, for-profit libraries might have some trouble meeting this condition. Very few private law libraries or corporate libraries would open their doors to other lawyers, competitors, or business rivals in a particular field.²⁷
- The reproduction or distribution must include a notice of copyright or a statement that the work may be protected by copyright if no notice is found on the original.

The exceptions granted under section 108 extend only “to the isolated and unrelated reproduction or distribution of a single copy...of the same material on separate occasions”²⁸ and

do not apply to “a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news.”²⁹

Once a library has met the requirements above, what type of copies and in what situations can you copy, scan, or distribute? The next section reviews Section 108 by type of reproduction permitted.

Replacement Copies (§108(c))

Up to three copies of a published work may be reproduced solely for the purpose of replacing a copy that is damaged, deteriorated, lost, stolen, or in an obsolete format. This reproduction is contingent on the library making reasonable efforts to determine that an unused replacement cannot be acquired at a fair price, and any such copy that is reproduced digitally is not made available to the public outside of the library.

What exactly is an obsolete format? Are VHS's, cassette tapes, or record players considered statutorily “obsolete?” The definition states that “a format shall be considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.”³⁰ In today's global economy, it is easy to see how Betamax, VHS, and Laserdisc might not be considered obsolete, considering you can easily find these players on eBay and other secondary markets.

Articles, Book Chapters, or Other Short Works (§108(d))

A copy of one article or a short excerpt from a copyrighted work may be made at the request of the user, subject to two specific conditions. First, the copy must become the property of the user, provided that the library has no notice that the copy will be used for any other purpose than private study, research, or scholarship. Second, the library must prominently display a copyright warning notice on any request form, including print or web forms, and at the location where the orders are accepted.

Archival Copies (§108(b))

If a work is unpublished, and currently resides in the collection of the library making a copy, the library may make three copies. These copies must be made solely for preservation and security or for the deposit for research use in another library. In the legislative history of the Copyright Act, the House Report noted that this right “would extend to any type of work, including photographs, motion pictures, and sound recordings.”³¹ Although this seems to be a fairly encouraging section for digital reproduction of many types of works, any of these archival copies made in a digital format under this section must not be made available to the public outside of the library.

Out of Print Works (§108(e))

A copy of an entire work may be made if the library has determined a copy cannot be obtained at a fair price, subject to the condition that the copy becomes the property of the user, the library has no notice that the copy is going to be used for any purpose other than private study, research, or scholarship, and the library must prominently display a copyright warning notice on any request form, including print or web forms, at the location where the copy orders are accepted.

Inter-Library Loan (§108(d), (e), and (g))

Interlibrary loan functions are impacted in many parts of Section 108. Libraries may make single copies of works and enter into interlibrary agreements. For the library that creates copies and sends them (the “lender” in ILL terminology), they must adhere to the general requirements mentioned above (§108(d) for short works/article or §108(e) for whole works/out of print works). The library that receives the copies (the “borrower”) has a different standard. They must not make so many requests “in such aggregate quantities as to substitute for”³² a subscription to a journal or purchase of a copyrighted work. The purpose was to prevent libraries substituting ILL article requests for purchasing a journal subscription.

To enumerate this section further, Congress established the National Commission on New Technological Uses of Copyrighted Works (CONTU) which issued guidelines in 1979.³³ CONTU specified that during one calendar year, a library may receive up to five copies of an article from the most recent five years of a single journal title. This guideline creates an expectation that libraries would purchase the journal, seek permission, or examine other options after receiving the fifth article during that year. The CONTU guidelines are not law, and, in this

part, only apply to articles. Law libraries must use their own judgment when interpreting the law when requests for copies of portions of books and other materials appear.

Library Copiers, Scanners, and other Reproduction Devices (§108)(f))

One of the most common questions about copiers in the law library is “Is the law library liable for the user’s violation of copyright on the copy machines?” Thanks to section § 108(f) libraries are protected from liability resulting from a user’s potential copyright infringements user when using copy machines in the library. Like most § 108 sections, in order to claim the benefit of this limited liability, there are two requirements. First, the copying must unsupervised by any library staff. Second, the copier must “display a notice that the making of a copy may be subject to the copyright law.”³⁴ You will find the some sample copyright notices at the end of this chapter.

By complying wit these simple provisions, a law library can effectively remove any potential liability for copyright infringement from patron copier use. The liability then shifts directly to the user making the copies. In a modern law library, this notice might appear on copy machines, scanners, microfilm readers, printers, or any other equipment capable of reproduction.

Digital Reproduction During the last 20 Years of the Term (§108(h))

As we have learned above, digital archives do not fall under the various §108 library exceptions. First, it does not apply to material the library or archive does not own. Second, a library cannot distribute digital copies or make them available to patrons outside the library premises. However, § 108(h) allows libraries and archives to reproduce, distribute, display, or

perform, in digital form, a copy of a published copyrighted work *during the last twenty years of any term of copyright* for purposes of preservation, scholarship, or research. This exception will apply as long the work is: 1) not still being commercially exploited, 2) the work cannot be obtained at a reasonable price and 3) the copyright holder does not provide notice that one of the above conditions applies. There is no definition to the term “reasonable price,” nor has any court specifically spoken to that portion of the statute. This section was, at the time period, a concession to libraries for public domain problems that arose because of the passing of the Sonny Bono Copyright Term Extension Act.³⁵

First sale doctrine (§109)

One of the more important limitations on the exclusive right of a copyright holder is the first sale doctrine, which prevents an owner from controlling subsequent transfers of his or her works. The first sale doctrine is a fundamental law that allows law libraries to loan books to patrons. Once a copyright holder transfers ownership of a copy, she no longer has rights to that copy. The statute states “the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”³⁶

Entire industries and enterprises are built upon the first sale doctrine. eBay relies on this provision when it permits users to sell copyrighted protected works through its site and libraries are permitted to lend to patrons copies of printed books that they acquired - all without the requirement of a request for permission from the copyright owner. Without this law, copyright holders could enforce rights in the “secondary market,” which would impact selling, loaning, or

gifting any copyrighted work. The rationale is that “once the copyright owner places a copyrighted item in the stream of commerce by selling it, he has exhausted his exclusive statutory right to control its distribution.”³⁷

In the digital context, although the first sale doctrine limits the copyright owner’s distribution right, it does not affect the reproduction right. Electronic transmissions of a work are generally forbidden because of the nature of copies in today digital environment. Files that are in .pdf format, for example, can allow a transfer from one party to another, but the transferor still may retain a perfect copy of the work. In 2001, the Register of Copyrights soundly rejected a recommendation to create a “digital first sale” doctrine, which would permit an owner of a digital work to transfer it to another person, provided that the original was deleted.³⁸ This rejection, along with other developments of this law from its origin to the present, makes it clear that §109 first sale rights mainly apply to physical disposal of copies, not digital, at least for now.

Rise of Digital Technology in Law Libraries

In the last decade, digital technology has altered the traditional concept of the law library. An attorney may no longer have a treatise or statute in her office. A student may never have to access the Federal Reporter in print during their time in law school. As a result of laptops, desktops, mobile phone, and tablets the patrons have a virtual law library “at their finger tips.” Mobile technology usage is rapidly increasing, and patrons may not be anywhere near the law library, but require its services. Using technology to modernize processes and collections, in light of these changes, has become a priority for law libraries to show their real value, in the face of shrinking budgets and instability in the legal job market.

Law libraries make extensive use of technology to catalog, store, and disseminate information. Some are digitizing print materials, creating searchable metadata, and developing websites. All of these functions involve copyright in some way. However, even though these new technological-focused projects are vital, access to information and its delivery has emerged as the focus of copyright law with regards to law libraries and their patrons. Over the next few sections we will examine some of the top delivery and access questions involving copyright, including e-reserves, licensing e-content, and modern document delivery programs.

e-Reserves and the Law Library

The appeal of e-reserves, especially in law schools, is apparent. The study of law is frequently filled with heavy casebooks, enormous hornbooks, or unmanageable treatises. Regardless of the class, typically a professor assigns some reading, and many times these readings end up in a law library reserve collection. Providing digital access to the reserve readings would not only alleviate the “heavy bag” dilemma, but also allow students to have equivalent access to the materials without having to wait for a fellow student to return the material from the standard 2-hour loan. Regardless of the advantages, copyright law is a definite factor to consider when scanning a copyrighted work into a e-reserve system.

In 1993, President Clinton formed the Information Infrastructure Task Force and specialized sub-group called the Working Group on Intellectual Property Rights. This group convened a Conference on Fair Use (CONFU) to bring together copyright owner and user interests to discuss fair use issues and, if possible, develop guidelines for fair uses of copyrighted works by librarians. One of the most hotly contested areas covered by CONFU was e-reserves.

Over 90 organizations representing for-profit and nonprofit publishers, the software industry, government, scholars, authors, photographers, the movie industry, public television, libraries, museums, universities, and colleges spent more than two and a half years to find agreement on the scope of e-reserves.

In March 1996, the Draft Guidelines for Electronic Reserves were completed. The guidelines were rejected by the majority of CONFU participants because there was no general consensus that the document represented an understanding of fair use by all participants. Some thought they guidelines were overly restrictive, and the content owners thought they went too far. It was decided at the CONFU session in November 1996 that the guidelines would not be distributed as part of the final CONFU report.

In November 2003, the American Library Association (ALA), with assistance from Georgia Harper, from the University of Texas System and Peggy Hoon from North Carolina State University, released a statement titled “Applying Fair Use in the Development of Electronic Reserves Systems.” Instead of trying to approach the e-reserve problem with a new set of guidelines, this statement expressed reliance on the already well-established, and statutorily created, fair use doctrine. The document was endorsed by American Association of Law Libraries, American Library Association, Association of Research Libraries, Medical Library Association, and Special Libraries Association.³⁹ Many libraries adopted similar recommendations, and based their e-reserve systems on fair use.

In April 2008, three textbook publishers, Oxford University Press, Cambridge University Press, and Sage Publications, filed a copyright infringement law suit against Georgia State University (“GSU”).⁴⁰ The suit claimed 99 specific instances of copyright infringement through

the distribution of copyright protected material via the GSU's online course management systems. Specifically, the publisher alleged that the library allowed the faculty to use the university library e-reserves systems to copy and distribute book excerpts to students without paying any licensing fees. In May 2012, U.S. District Court Judge Orinda D. Evans ruled in favor of the university in 95% of the excerpts under the fair use doctrine. This is one of the most important digital fair use decisions to be released, and more importantly, for our discussion, specifically based on a library e-reserve policy. Let's examine this case closely, and look at how the court came to the conclusions it did for each of the four factors of fair use for digital e-reserves.

First Factor

What was unique about this case was that it was the first e-reserves case to come from a real educational system, GSU. The court itself states "there is no precedent ... for how the [fair use] factors should be applied where excerpts of copyrighted works are copied by a nonprofit college or university for a nonprofit educational purpose." Previous reserves and course pack cases were examined in the commercial, for-profit context. In *Basic Books, Inc. v. Kinko's Graphics Corp.*, the court found that Kinko's, a commercial enterprise, was infringing copyright when it photocopied book chapters for sale to students as coursepacks for local university classes.⁴¹ In *Princeton University Press v. Michigan Document Services, Inc.*, in facts very similar to the similar to the *Kinko's* case, a copy shop created and sold coursepacks for a local university. The court found that the copy shop was infringing copyright by creating and selling the coursepacks.⁴²

Judge Evans distinguished this case from *Kinko's* and other commercial defendants, noting that Georgia State University “is a purely nonprofit, educational institution and the excerpts at issue were used for purely nonprofit, educational purposes.”⁴³ As a result, the court held that the purpose factor was squarely in favor of fair use. Judge Evans stated “the language of § 107 itself ... compel the decision that the first fair use factor favors Defendants. This case involves making copies of excerpts of copyrighted works for teaching students and for scholarship, as specified in the preamble of § 107....The fact that the copying is done by a nonprofit educational institution leaves no doubt on this point.”⁴⁴

The Second Factor

Here Judge Evans, although considering the argument from the publishers that compiling scholarly works can be difficult, she nevertheless found most of the works at issue were scholarly non-fiction, and were therefore less creative in nature. Because the works are less creative, and more information-heavy, the scope for finding fair use is much wider, even if they are digital copies of those works. Analyzing the most helpful caselaw, the judge found that factor two favored GSU, specifically because they were using e-reserves of scholarly, nonfiction works.⁴⁵

The Third Factor

As stated in the previous fair use section, this factor looks at the amount and substantiality of the portion copied or used. Although the court stated a general conflict between the flexible fair use standard and a strict quantity measure, Judge Evans stated that e-reserves

“must fill a demonstrated, legitimate purpose in the course curriculum and must be narrowly tailored to accomplish that purpose.”⁴⁶

With that statement a bright line test was developed, based on the safe harbor of a “decidedly small” portion of the work. The court stated the following formula:

Where a book is not divided into chapters or contains fewer than ten chapters, unpaid copying of no more than 10% of the pages in the book is permissible under factor three. . . . In practical effect, this will allow copying of about one chapter or its equivalent. Where a book contains ten or more chapters, the unpaid copying of up to but no more than one chapter (or its equivalent) will be permissible under fair use factor three. Excerpts which fall within these limits are *decidedly small*, and allowable as such under factor three.⁴⁷

This was a surprising part of the decision for many advocates of fair use. Fair use was created to be a flexible standard, not set with ridged rules. However, it is important to stress that this is just one factor in a four factor test. Just because there is a use over 10% or one chapter does not necessarily mean it is automatically infringement, nor does it trump any of the other factors. In fact, as we will show below, even when there is use over the 10% or one chapter standard, there can still be an overall fair use.

Two real positive results from the examination of the third factor in this case was the wholesale rejection of the “1976 Classroom Guidelines” and the “one-time use limit.” The 1976 Classroom Guidelines were left over products from the legislative history of the Copyright Act. They were negotiated on behalf private interest groups and attempted to define the maximum

amount of copying allowable for “safe harbor” from litigation. They set horrendously small and useless portions of articles, newspapers, prose, and other material for use in the classroom.⁴⁸

The court rejected the guidelines and stated they certainly did not represent the legal definition of fair use. Judge Evans said “Plaintiffs do not explain their decision to seek acceptance of the minimum standards as the maximum standard.”⁴⁹

The “one-time use limit” had previously haunted e-reserves specialists because it was thought that repeated use of the same excerpt across multiple semesters would count against fair use. The court said, “The idea that professors be prohibited from unlicensed use of the same chapter from one academic term to the next is an impractical, unnecessary limitation. The right approach is to select a percentage of pages which reasonably limits copying and to couple that with a reasonable limit on the number of chapters which may be copied.”⁵⁰

The Fourth Factor

Fundamentally, it is understood how the fourth factor truly expresses the balance of fair use against a rightsholder’s work. Whether or not the market is harmed by the use is an important part of the economic monopoly given to authors for limited times, as an incentive to continue to create new works.

In the GSU decision, the judge, once again, broke into new territory. “For loss of potential license revenue to cut against fair use, the evidence must show that licenses for excerpts of the works at issue are easily accessible, reasonably priced, and that they offer excerpts in a format which is reasonably convenient for users.”⁵¹ The rule that develops from this decision is that when digital permissions are available, and the library did not seek the digital permission,

this tilts the fourth factor strongly in favor of the rightsholder. However, the language of the court is clear: it is important that the work for e-reserves must be readily available and reasonably priced specifically in the context of *digital excerpts*. By analogy, if there was only a license to access the entire work, or only a license to make photocopies, this might favor the factor towards fair use, since there was no specific e-reserve excerpt license.

Conclusion

The ruling, which took a year to complete, and comprises 350 pages, held that the University library's e-reserves fair use policy was a good faith effort to comply with the copyright law and, for the purpose of awarding costs for the case, determined that GSU was the prevailing party. Although the judgment is limited to the jurisdiction and the parties involved, this case will continue to influence future fair use decisions in the digital e-reserves arena for years to come. Law librarians would be best served by reading, discussing, and considering some of the recommendations and analysis offered by this decision for their own e-reserve programs.

Licensing for e-Content

Closely related to the previous §109 discussion above is the licensing or contracting rights to materials. §109 specifically excludes the doctrine's application when the copy is transferred through "rental, lease, loan, or otherwise, without acquiring ownership of it."⁵² A rental or lease is governed by contract law. Presently, the licensing of digital content exists in a legal realm that is separate from copyright law. They do not have the same requirements and often are not governed by the same laws. A license is a contract, an agreement between two parties to specific terms. They can modify, change, or alter rights held by either party.

A sale or gift under §109 involves the passing of title to the recipient. A rental, lease, or loan involves only a temporary transfer of rightful possession of the thing rented, leased, or loaned, and, contractually, a period of possession will come to a close at some future date. In the 1990's software producers feared that under §109 there would be a rise of software rental stores comparable under to the popular video rental stores, and then, as a result of the technological ease of copying software, consumers would simply rent, rip, and return software rather than purchase their own copy of the program. As a result, Congress enacted the Computer Software Rental Amendments Act of 1990, which amended § 109 to forbid the unauthorized rental, lease, or lending of copies of computer programs for the purposes of direct or indirect commercial advantage except by non-profit libraries and non-profit educational institutions.⁵³

The lessons from the software industry were absorbed by publishers when they began to market e-books to libraries. As many law librarians know, e-books are not sold to consumers, or law libraries; they are licensed as part of a contract. This creates a fundamental shift in the rights exercised by law libraries, their patrons, and their services. As stated earlier, to rely on the § 109 first sale doctrine, the owner must actually sell the work to the user, then the user may dispose of possession of that copy. If there is no sale, however, the user cannot rely on the first sale doctrine.

For example, “purchasers” of e-books from Amazon are not the owners of that content and, therefore, cannot rely on §109 to convey ownership or even possession of such content to a third party without consent. Although users “buy” e-books from Amazon, they do not actually purchase them directly; they are rented. Furthermore, e-book vendors often police their licenses with digital rights management (DRM). DRM's are access control technologies that limit the use of digital content and devices. In fact, there have been cases where Amazon, within their

rights as a licensor, removed e-book content from user's Kindle. While this sounds overreaching, the action is well within the specific terms of the license.⁵⁴ If the users of that content do not agree with the terms, or struggling with DRM that would allow this type of action, it is their right to decline the terms of the license. But, of course, then they will not be able to read the e-book.

In 2011, HarperCollins, one of the large e-books publishers, announced that circulation of their new e-book titles acquired by libraries would be limited to twenty-six loans. Afterwards, claimed HarperCollins, the books would expire, and require an additional payment to maintain it in the library e-book collection. Many librarians, from all types of libraries, were outraged by the suggestion that publishers were now deciding not only the price, but directly impacting decades of circulation policies and preservation practices.⁵⁵

The end result is higher prices for access to e-books for law libraries. With the evasion of the first-sale doctrine through contract and DRM, the law library model for digital collection development will be pushed toward rental and not ownership. Is this the model we want to endorse? It is up to every law librarian, every law library, and the larger regional and national law library organizations to understand licensing and contract law when they are entering into e-book licensing agreements. The reward is providing patrons with works they want in the digital environment. The cost may be greater in terms of disturbing collection development, the risk of massive price increases, and the inability to preserve and/or archive any of the e-book materials for your law library.

Law Libraries across the United States are finding new ways to take advantage of their special role in the Copyright Act, and provide enhanced “at the fingertip” research capabilities for their faculty, students and staff. As an example, we will briefly talk about at the Scan and Deliver services implemented at Harvard, University of Chicago, and Yale.

Harvard Library launched the Scan & Deliver service in May 2009.⁵⁶ The intention was to provide Harvard students and researchers, on-campus, off-campus, across the country, or on another continent, access to the 10 million items collected in all the Harvard libraries. Prior to that service being launched, interlibrary loan units utilized OCLC as mechanism for requesting and fulfilling article requests through the local Harvard system, but this system wasn’t ideal. It required a lot of work-around and frequently impacted standard ILL operations. Also, there was patron confusion about what items/collections were eligible under ILL system. The Harvard Scan & Deliver system changed all of that by allowing Harvard affiliated students, faculty, and staff to request copies of book chapters or articles directly through the Harvard Library catalog, regardless in which library the work was held.

University of Chicago and Yale University launched similar Scan and Deliver services in 2012.⁵⁷ Similar to the Harvard model, it allows members of the university community to request a copy of an article or chapter to be delivered to them via email in a pdf format. Users can simply find the book or journal they are looking for in the library catalog, and click on the link, and within 4 days, they receive a copy of the requested material, regardless of the location. One main difference is that Yale also offers this Scan and Deliver service to its alumni.

Looking at the rules and guidelines, you can see that each of these programs worked with university counsel and the library staff to determine what limits should be set, so that there was

little possibility of copyright infringement. As we reviewed in the sections above, libraries have some special exceptions under the Copyright Act. In particular, § 108(d) and (e) deal with copies for private study, and relate closely to the Scan and Deliver services. Specifically, § 108(d) is utilized for copies of articles, book chapters, or portions of other works. The section requires that the copy become property of the use, that the library has no notice that the copy is for any other purpose than scholarship or research, and that a copyright warning notice is prominently displayed. All the Scan and Deliver systems at all three universities meet the criteria for § 108(d).

Additionally, each library doubles down on the risk mitigation by creating its own “built in” fair use guidelines. All the university libraries set a maximum amount of requests and pages that a user can order from the Scan and Deliver service. A user may make two requests a day. They may not request from the same source in a single semester. Depending on the university, the users are also limited to approximately thirty pages, or one article, or one chapter per request. Again, this is to absolutely ensure that the libraries are well within fair use ranges, and compliance with § 108(d).

The service has come to enhance the libraries offering of “just in time” research methods. Harvard reported that one graduate student in China was able to complete her dissertation without having to return to the United States to access the library collection. Other improvements in the future may include more microform eligibility and OCR-ready PDF’s to aid in the searchability of a document.

Private law firms have offered “desktop delivery” of their services over intranet systems for years. However, they frequently do not rely on fair use or § 108(d) to make copies available to their patrons. Private law firms often license with vendors and define their uses very

specifically. The license is what governs the ability to share articles, chapter, and other material over a law firm library network.

If you are working with a vendor and want to include some digital content your law firm's document delivery program, or start a document delivery program, make sure to spell it out clearly in the license. The terms for "authorized users" and "authorized sites" are critical to a license, and you may negotiate these terms with the vendor. Do you want access for partners, in-house counsel, consultants, or independent contractors? Additionally, *where* these people might access the materials is typically found under the "authorized sites" in the license. Normally these are either "in-office" or "remote access." Make sure you clearly define where the majority of the documents or content will be delivered. For example, if some of your attorneys are constantly in court, make sure that remote access, set for a mobile device, is part of the license.

Other factors to consider are whether or not you have access to digital content from a single computer, from a network of specified users, or an unlimited number of users. Again, these may be options for your negotiation with the vendor to provide the best service possible to the employees in the law firm.

Fair Use Checklists

Many librarians, teachers, lawyers, utilize a "fair use checklist" to determine whether or not their action falls within the parameters of fair use. Although there are many versions, these checklists all provide a series of questions or choices, to help aid the complex fair use analysis. While no checklist is complete, and can easily be weighted on one side or another depending on

the language, they have been used in law libraries for many years. Below is a list of some of the most popular.

- Fair Use Checklist, Columbia Copyright Advisory Office, by Dr. Kenneth D. Crews.
This is the most famous, and most adopted, fair use checklist available. Dr. Crews is a nationally recognized fair use expert in the United States.
(<http://copyright.columbia.edu/copyright/fair-use/fair-use-checklist/>)
- Checklist for Conducting a Fair Use Analysis. This is revised for use by Cornell University from the "Checklist for Fair Use," by Dr. Kenneth D. Crews
(http://copyright.cornell.edu/policies/docs/Fair_Use_Checklist.pdf)
- Checklist for Fair Use by the Copyright Clearance Center. This interactive checklist is also based on the Fair Use Checklist created by Dr. Kenneth D. Crews
(http://www.copyright.com/Services/copyrightoncampus/basics/fairuse_list.html)
- Board of Regents Fair Use Checklist by Georgia State University. Note the addition of guidelines in fair use factors three and four as a result of the *Cambridge University Press et al. v. Patton et al.* litigation.
(http://www.gsu.edu/images/legal/Fair_Use_Checklist.pdf)
- Thinking Through Fair Use by the University of Minnesota. This tool offers some additional analysis to the user, and is well presented.
(<https://www.lib.umn.edu/copyright/fairthoughts>)
- Fair Use Evaluator by Michael Brewer & ALA Office for Information Technology Policy. An excellent, interactive tool designed to help users better understand how to determine the fairness of their use under the U.S. Copyright law.
(<http://librarycopyright.net/resources/fairuse/>)

Codes of Best Practices

Codes of best practices have become common tools over the last decade to mitigate risk for a host of civil and criminal wrongs, including copyright infringement. The term has not been defined by case, statute, or regulation very well, but has its origins in the business management, not law. There are some elements of them found in the law. The Uniform Commercial Code, for example, is an attempt to codify industry best practice.

These codes are usually compiled from actions, thoughts, practices, and values of a particular community's mission. They are not law, but have the effect of defining what is "reasonable," so that if litigation does arise, the courts can look at these best practices a form of good faith effort, or to alleviate some of the brunt of liability. Determining the minimum practices necessary to protect against potential liability will ultimately be decided on a case-by-case basis in a court of law.

However, these codes of best practice are useful as tool of education, risk mitigation, indicators of what is reasonable, and make great aspirational goals for a particular profession or work function. And, as a result of the rapid movement into digital age, these best practices frequently have to do with new technology.

- *The Code of Best Practices for Fair Use in Academic and Research Libraries* by Association of Research Libraries, the Center for Social Media, School of Communication, American University, and the Program on Information Justice and Intellectual Property, Washington College of Law, American University. This is a code of best practices in fair use devised specifically by and for the academic and research library community. It enhances the ability of librarians to rely on fair use by documenting

the considered views of the library community about best practices in fair use, drawn from the actual practices and experience of the library community itself.

(<http://www.centerforsocialmedia.org/libraries>)

- *Code of Best Practices in Fair Use for Media Literacy Education* by the Center for Social Media at American University, The Media Education Lab at Temple University, and The Program on Information Justice and Intellectual Property, Washington College of Law, American University (<http://www.centerforsocialmedia.org/fair-use/best-practices/fair-use-codes-best-practices>)
- *Code of Best Practices in Fair Use for Scholarly Research in Communication* created by the International Communication Association, funded by the International Communication Association and the Ford Foundation, through the Center for Social Media's Future of Public Media (<http://www.centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-scholarly-research-communication>)
- *Code of Best Practices in Fair Use for OpenCourseware* by the Center for Social Media and The Program on Information Justice and Intellectual Property, Washington College of Law, both at American University.
(http://www.centerforsocialmedia.org/resources/publications/code_of_best_practices_in_fair_use_for_opencourseware1)
- *Code of Best Practices in Fair Use for Online Video* by the Center for Social Media and The Program on Information Justice and Intellectual Property, Washington College of Law, both at American University.
(http://www.centerforsocialmedia.org/resources/publications/fair_use_in_online_video/)

- *Orphan Works: Statement of Best Practices* by the Society of American Archivists. This aids in determining effort levels and tools in identifying and locating creators and owners of orphaned works. (<http://www.archivists.org/standards/OWBP-V4.pdf>)

Sample Required © Notices

Section 108 of the Copyright Act provides that you must have specific copyright language displayed on any machine capable of reproducing copies (photocopier, scanner, etc). The statute does not state the size, color, location, or any other detail other than the requirement that the sign be placed on the machine.

The ALA recommends this notice:

- Notice: The copyright law of the United States (Title 17, U.S. Code) governs the making of photocopies or other reproductions of copyrighted material. The person using this equipment is liable for any infringement.”

The American Association of Law Libraries has a “Model Law Firm Copyright Policy” which has this simple language recommended for law firm copiers and other reproduction machines:

- "THE MAKING OF A COPY MAY BE SUBJECT TO THE UNITED STATES COPYRIGHT LAW (Title 17 United States Code)."

Recently, the University of Michigan Library updated its copyright signage to reflect their compliance with 108 and their encouragement of fair use:

- THE LAW REQUIRES THAT WE TELL YOU THIS: Copyright Notice for Unsupervised Copying Equipment Section 108(f)(i) of the U.S. Copyright Act (Title 17 United States Code) protects libraries from liability for infringements committed by unsupervised users of copying equipment. *We can help you to understand how to use equipment and resources in this library facility, but we cannot make copyright determinations for you. You must make your own assessment of your copyright implications. In using the copyright equipment in this library facility, keep in mind:*

Notice: The copyright law of the United States (Title 17, U.S. Code) governs the making of photocopies or other reproductions of copyrighted material; the person using this equipment is liable for any infringement.

THE LAW DOES NOT REQUIRE THAT WE TELL YOU THIS: Copyright law gives authors certain rights -- but it also gives users rights too. Fair use (Section 107 of the Copyright Act) allows users to make certain uses of copyrighted works without permission. The Library cannot give you advice on where to draw the line – use your best judgment.

Conclusion

A basic understanding of copyright is essential to navigate all the potential interactions we face as law librarians when we assist students, faculty, staff, patrons, clients, and others. We have reviewed some of the Copyright Act, especially as it pertains to the special provisions libraries have inside the law. We have reviewed some of the newest library and technology-focused decisions affecting our day-to-day operations in law libraries.

However, we should not stop here. An interest in copyright law requires frequent reading and reviewing. By keeping up with current awareness for these and other copyright issues, law librarians can take an active role in becoming advocates in areas such e-book rights, licensing, contracts, and fair use. The knowledge of copyright law can help mitigate risk in our own organizations, but it also can help us increase awareness in our community at large.

¹ 17 U.S.C. §101 et seq. (2006).

² U.S. Const., Article I, § 8, cl. 8 (1789).

³ 17 U.S.C. §102 (2006).

⁴ 17 U.S.C. §302 (2006).

⁵ 17 U.S.C. §102 (2006).

⁶ For example in the case of sound recordings, copyright owners may perform the work publicly by means of a digital audio transmission. See 17 U.S.C. §106 (2006).

⁷ 17 U.S.C. § 101 et seq. (2006).

⁸ 17 U.S.C. § 504(c)(2) (2006).

⁹ 17 U.S.C. §105 (2006). However, much of the law library community is aware that the editorial enhancements added to cases, such as Westlaw or Lexis headnotes, key numbers, and summaries, may be copyrighted material not in the public domain. Therefore the opinion of the court, itself, is in the public domain, and the vendor added enhancements are covered by copyright. See *Little v. Gould*, 15 F. Cas. 612 (C.C.N.D.N.Y. 1852) (No. 8,395)(noting that “the written opinions of the judges . . . were regarded as having become the property of the public, and, therefore, as not the subject of a copyright.”); *West Publ’g Co. v. Lawyers’ Coop. Publ’g Co.*, 79 F. 756, 761 (2d Cir. 1897) (noting that a reporter of court opinions “may acquire a valid copyright for the headnotes, footnotes, tables of cases, indexes, statements of facts, and abstracts of the arguments of counsel, where these are prepared by him and are the result of his labor and research.”).

¹⁰ 17 U.S.C. §107 (2006)

¹¹ See *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841), where Justice Story laid out the initial statements that were to become the four factor test used for fair use analysis today.

¹² 17 U.S.C. §107 (2006).

¹³ *Ibid.*

¹⁴ H.R. Rep. No. 1476, 94th Cong., 2d Sess. 65 (1976); S. Rep. No. 473, 94th Cong., 1st Sess. 62 (1975), quoted in *American Geophysical Union v. Texaco Inc.*, 37 F.3d 881, 884 (2d Cir. 1994).

¹⁵ For a more detailed description of HathiTrust, and its partners, please see their official website at <http://www.hathitrust.org/>

¹⁶ *Authors Guild, Inc. v. HathiTrust*, 2012 WL 4808939 (S.D.N.Y. Oct. 10, 2012).

¹⁷ “Transformative use” was first used in the Supreme Court fair use case *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (“The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely ‘supersede[s] the objects’ of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’”) *Ibid.* at 579.

¹⁸ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

¹⁹ *Authors Guild, Inc.* at 12.

²⁰ *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985).

²¹ *Authors Guild at 12.*

²² *Ibid.*, 13.

²³ Ibid.

²⁴ Ibid., 14.

²⁵ Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. Pa. L. Rev. 549, 556 (2008).

²⁶ H.R. Rep. No. 1476, 94th Cong., 2^d Sess. 47, 75 (1976)(hereinafter *House Report*). Cf. S. Rep. No. 473, 94th Cong., 1st Sess. 60, 67 (hereinafter *Senate Report*) (“108...is intended to preclude a library or archives in a profit-making organization from providing photocopies of copyrighted materials to employees engaged in furtherance of the organization’s commercial enterprise, unless such copying qualifies as a fair use, or the organization has obtained the necessary copyright licenses. A commercial organization should purchase the number of copies of a work that it requires, or obtain the consent of the copyright owner to the making of the photocopies.”) To date, no court has adjudicated the difference between the *House Report* and the *Senate Report*.

²⁷ Register of Copyrights, *Library Reproduction of Copyrighted Works (17 U.S.C. §108)* (Washington D.C.: U.S. Copyright Office, 1983), 78-79.

²⁸ 17 U.S.C. §108(g) (2006).

²⁹ 17 U.S.C. §108(i) (2006).

³⁰ 17 U.S.C. §108(c) (2006).

³¹ *House Report* at 75.

³² 17 U.S.C. §108(g)(2) (2006).

³³ National Commission on New Technological Uses of Copyrighted Works, *Final Report of the National Commission on New Technological Uses of Copyrighted Works*, (Washington D.C.: Library of Congress, July 31, 1978).

³⁴ 17 U.S.C. § 108(f) (2006).

³⁵ Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298 (1998) (codified as amended in various sections of title 17 of the United States Code (U.S.C.)). In 1998, the Sonny Bono Copyright Term Extension Act extended the term of copyright for twenty years, for both existing and future works.

³⁶ 17 U.S.C. §109(a) (2006).

³⁷ *Quality King Distributors, Inc. v. Lanza Research Intern., Inc.*, 523 U.S. 135, 152 (1998).

³⁸ Register of Copyrights, *Digital Millennium Copyright Act Section 104 Report* (Washington D.C.: August 2001), x-xi, xix-xx.

³⁹ American Library Association, “Applying Fair Use in the Development of Electronic Reserves Systems,” accessed December 4, 2012, <http://www.ala.org/advocacy/copyright/fairuse/fairuseandelectronicreserves>

⁴⁰ *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190, 1224 (N.D. Ga. 2012).

⁴¹ *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F.Supp. 1522 (S.D.N.Y. 1991).

⁴² *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996).

⁴³ *Cambridge Univ. Press* at 1224.

⁴⁴ Ibid.

⁴⁵ Ibid., 1225-27.

⁴⁶ Ibid., 1233.

⁴⁷ Ibid., 1243.

⁴⁸ The Classroom Guidelines are known officially as “Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions,” *House Report*, 68. Specifically, the parties who agreed to the Classroom Guidelines were the Ad Hoc Committee on Copyright Law Revision, the Author-Publisher Group, the Authors League of America, and the Association of American Publishers, Ibid., 70. The American Association of University Professors and the Association of American Law Schools strongly criticized the Guidelines as being too restrictive. Ibid., 72.

⁴⁹ *Cambridge Univ. Press* at 1228.

⁵⁰ Ibid., 1234-35.

⁵¹ Ibid., 1237.

⁵² 17 U.S.C. §109(d) (2006).

⁵³ Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650, codified at 17 U.S.C. §109(b) (2006).

⁵⁴ Amazon’s Kindle “Conditions of Use” state that “All content included in or made available through any Amazon Service, such as text, graphics, logos, button icons, images, audio clips, digital downloads, and data compilations is the property of Amazon or its content suppliers” “Amazon’s Kindle Conditions of Use,” accessed December 30, 2012, https://kindle.amazon.com/conditions_of_use.

⁵⁵ Josh Hadro, "HarperCollins Puts 26 Loan Cap on Ebook Circulations," *Library Journal.com*, last modified February 25, 2011, http://www.libraryjournal.com/lj/home/889452-264/harpercollins_puts_26_loan_cap.html.csp

⁵⁶ "Harvard Libraries Launch Scan and Deliver Service," Harvard College Library News, accessed December 30, 2012, http://hcl.harvard.edu/news/articles/2009/scan_and_deliver.cfm

⁵⁷ Aspara Iyer and Julia Zorthian, "Library launches 'Scan and Deliver' service," Yale Daily News (Online), last modified September 18, 2012, <http://yaledailynews.com/blog/2012/09/06/library-launches-scan-and-deliver-service>; "Scan & Deliver service brings the Library to you," The University of Chicago Library News, last modified January 18, 2012, <http://news.lib.uchicago.edu/blog/2012/01/18/scan-deliver-service-brings-the-library-to-you-2/>